NO. _____

In the Supreme Court of the United States

STEPHEN B. TURNER,

Petitioner,

–V–

MELODY SMITH, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO PROCEED IFP AND PETITION FOR WRIT OF CERTIORARI

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AUGUST 8, 2018

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QUESTIONS PRESENTED

Petitioner is a parolee subject to a parole condition prohibiting him from associating with his own fiancée. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court provided for a hearing to determine the factual basis for parole violations. The Ninth Circuit Court of Appeals has now effectively decided that claims stemming from parole violations are not subject to judicial review. Specifically, the Ninth Circuit found that, in enforcing parole decisions, parole enforcement officers are acting in a quasi-judicial role requisite to absolute immunity. This Court should grant the Petition for Writ of Certiorari because the Court now needs to provide clarity on the judicial review of challenges to parole policies.

QUESTIONS PRESENTED

1. Whether, despite federal laws stemming from the Fourteenth Amendment which grant prisoners the right to marry, it is constitutionally permissible to impose parole conditions that deny a parolee the right to marry.

2. Whether granting parole officers absolute immunity effectively removes judicial review.

PARTIES TO THE PROCEEDING

Petitioner

- Stephen B. Turner

Respondents

- Melody Smith, in her Individual and Official Capacity as Parole Officer;
- Gregory Sims, in his Individual and Official Capacity as Assistant Parole Supervisor;
- John Bent, in his Individual and Official Capacity as Parole Supervisor; and
- Brett Everidge, in his Individual and Official Capacity as Parole Officer.

There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stephen B. Turner respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The district court's order granting Respondents' motion for summary judgment (Pet.App.5a) is unpublished. The opinion of the Ninth Circuit Court of Appeals (Pet.App.1a-4a) is unpublished.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on May 10, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

- **U.S. Const. amend. XIV, § 1**

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This case involves serious constitutional challenges by a parolee who was prohibited from marrying his fiancée—or even contacting her—as a condition of parole. In a one-paragraph analysis, the district court granted summary judgment to Respondent parole officers on grounds that absolute immunity protects them (an argument they did not even raise in their motion for summary judgment). Worse yet, the Ninth Circuit Court of Appeals chose to affirm this flawed analysis in a one-paragraph analysis of its own.

Significantly, the Ninth Circuit did not discuss whether parole officials are protected by absolute immunity when they engage in conduct that is not related to granting, denying or revoking parole, or when they apply parole conditions arbitrarily. Instead, the Ninth Circuit simply stated that absolute immunity allows Respondent parole officers to single out Petitioner and prohibit him from associating with his own fiancée.

This is an arbitrary imposition of unconstitutional state action and falls outside the scope of absolute immunity. On its face, the conduct of a parole officer acting like a police officer by enforcing regulations is not quasi-judicial and, by axiom, quasi-judicial immunity is inapposite. Accordingly, the Court should grant certiorari.

Significantly, Procedural Due Process under the Fourteenth Amendment is implicated when the Petitioner has been deprived of a significant liberty interest without due process of law This Court has held that pre-deprivation process is required

when the deprivation is foreseeable or recurring. (*Zinermon v. Burch*, 494 U.S. 113, 132 (1990).) And when pre-deprivation is required, that process typically requires giving the parolee notice of the deprivation and the opportunity to respond to its justification. (*Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).)

STATEMENT OF THE CASE

1. Petitioner Stephen B. Turner was a physician. CT. 181, ER. 154.[1] He was charged with indecent exposure in 1993 (CT. 181, ER. 171), and his medical license was thereafter revoked. CT. 181, ER. 161. In 2006, Petitioner was convicted of practicing medicine without a license and related offenses, and was released on parole in 2010. CT. 180, ER. 286. After paroling, Petitioner became engaged to Amy Miranda. CT. 181, ER. 205. However, because Ms. Miranda had a 9-year old daughter, defendant parole officers prohibited Petitioner from associating with her. CT. 181, ER. 295, 385 ["You will have no contact with: Amy Miranda, aka 'Kelly'"]. Petitioner was therefore unable to marry Miranda, and their relationship has now "changed." CT. 181, ER. 198.

2. Original Proceedings. Petitioner filed this action *pro se* in 2011. CT. 2, ER. 16-88. After several amendments, and a dismissal that was reversed by the Ninth Circuit Court of Appeals, the district court granted in part and denied in part Respondents' motion for judgment on the pleadings.

[1] All references to "CT.," "ER.," and "Ex." are to the record clerk's transcript, excerpts of record, and record exhibits on file with the Ninth Circuit Court of Appeals, Case No. 17-15538.

Plaintiff filed his Fifth Amended Complaint on March 2, 2016. The Fifth Amended Complaint alleged causes of action for:

1. Violation of 42 U.S.C. § 1983 for interfering with:
    a. Plaintiff's right to use the judicial system to petition the government for redress;
    b. Plaintiff's right to associate and communicate with close family members, including Plaintiff's fiancée, and the right to marry his fiancée;
    c. Plaintiff's right to be free from arbitrary and capricious law enforcement and undue police intrusions;
2. Negligence under state law;
3. Violation of the Bane Act under state law; and
4. Intentional infliction of emotional distress under state law.

CT. 168; ER. 089-088.

On December 2, 2016, the district court granted the parties' stipulation to the dismissal of Petitioner's second, third and fourth causes of action without prejudice. CT 183; ER. 414. That same day, the parties filed cross motions for summary judgment. CT. 180, 184.

After the motions were fully briefed, the district court issued an order asking the parties to file supplemental briefs on the issue of whether Respondents were entitled to summary judgment on Petitioner's claims of retaliation for exercising his First Amendment rights. CT. 196. After the parties filed their respective supplemental briefs, the district court issued an order on March 7, 2017, denying Petitioner's motion for partial summary judgment and granting Respondents' motion for summary judgment in its

entirety, including the retaliation arguments that the district court asked for *sua sponte*.[2] CT. 205, ER. 001-010.

3. The Ninth Circuit Court of Appeals. Petitioner timely appealed the district court's judgment to the Ninth Circuit Court of Appeals. He made two arguments that remain relevant at this stage of the proceedings. He asserted that it was unconstitutional for parole officers to prohibit a parolee from associating and marrying his fiancée. He also asserted that parole officers who prohibit a parolee from associating with, and marrying their fiancée are not protected by absolute immunity.

The Ninth Circuit rejected Petitioner's arguments and affirmed the district court. Pet.App.1a-4a. The Ninth Circuit's analysis of the denial of Petitioner's right to marry consisted of one paragraph:

> Appellees are entitled to absolute immunity for the imposition of Appellant's challenged parole condition. Appellant contends that the special parole condition prohibiting contact with his fiancée violated clearly established law. However, a parole officer's quasi-judicial acts, including the establishment of a parole condition, are subject to absolute immunity. *Thornton v. Brown*, 757 F.3d 834, 839-840 (9th Cir. 2013); *see also Swift v. California*, 384 F.3d 1184, 1189 (9th Cir. 2004) ("Absolute immunity has also been extended to parole officials for the imposition of parole conditions . . . ").

Pet.App.2a.

The Ninth Circuit also rejected Petitioner's argument that parole officials violated his First Amendment constitutional rights when they revoked his parole after he made public statements indicating that he was going to take legal action against one of them.

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[2] The District Court even addressed Petitioner's state-law claims, apparently having forgot that those very claims had been voluntarily dismissed without prejudice on December 2, 2016.

This petition followed.

REASONS FOR GRANTING THE PETITION

The Fourteenth Amendment establishes the fundamental right of marriage. Federal laws have established that prisoners have the right to marry. *Turner v. Safley*, 482 U.S. 78 (1987). Yet, in this case, the Ninth Circuit Court of Appeals has effectively held that parolees do not have a right to marry, inasmuch as denial of that right will not be subject to judicial review. The Ninth Circuit specifically avoided Petitioner's constitutional claim by deciding that since barring petitioner from his fiancée was a parole condition and imposing parole conditions affords parole officers absolute immunity, it did not have to ascertain whether the parole condition itself was unconstitutional. This is untenable and has serious consequences on the rights of parolees to challenge their parole conditions, even when they are plainly unconstitutional.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER ABSOLUTE IMMUNITY SHOULD BE ALLOWED TO CIRCUMVENT JUDICIAL REVIEW OF WHETHER A PAROLE CONDITION CAN PROHIBIT THE FUNDAMENTAL RIGHT TO MARRY

The right to marry is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). *See also Maynard v. Hill,* 125 U.S. 190 (1888). In fact, marriage is such a fundamental right that, although subject to substantial restrictions, it is one of the constitutional rights not abridged by the prison context. *Turner v. Safley*, 482 U.S. 78, 95-96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

It is well established that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others . . . ." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The First Amendment protects "certain intimate human relationships . . . that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir.1995) (citing *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) (internal quotation marks omitted).

This Court has stated that the Constitution protects "certain kinds of highly personal relationships." (*Roberts*, 468 U.S. at 618, 619-20, 104 S.Ct. 3244.) The protection is not restricted to relationships among family members. *See Board of Directors of Rotary Int'l*, 481 U.S. at 545, 107 S.Ct. 1940. Outside of the prison context, this Court has intimated that there is a right to maintain certain familial relationships. (*Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003).) Although this Court has not determined the scope of any associational rights retained by prisoners, it has also "not [held] . . . that any right to intimate association is altogether terminated by incarceration." *Ibid.*

While this Court has not definitively spoken on this issue of whether a fiancée constitutes the type of "highly personal relationship" protected by the Constitution, the Circuits have. In *United States v. Wolf Child*, 699 F.3d 1082, 1095 (9th Cir. 2012), the

Ninth Circuit even did so in the context of parolees. In that case, the Court analyzed the issue of whether a special condition of supervised release which included a prohibition from dating or socializing with the defendant's "life partner" implicated defendant's liberty interest in intimate association. *Id.* The Court determined that a romantic relationship with one's "life partner implicates a particularly significant liberty interest in intimate association." *Id.* Significantly, the Ninth Circuit's decision in *Wolf Child* was based on its decision in *United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010), which was decided only several months before the very parole decision challenged in the instant case.

In *Napulou*, a case decided February 1, 2010, before the imposition of Petitioner's parole conditions, the Ninth Circuit held that while it "is not ordinarily required to articulate reasons for imposing a condition of supervised release, we have recognized an exception to this rule when a condition implicates a particularly significant liberty interest. A ban on associating with a life partner implicates such an interest." *Id.* at 1047. The Ninth Circuit found that the restriction on associating with persons with misdemeanor convictions was not reasonably related to the risk that defendant would reoffend, and that there was insufficient evidence that repeatedly incarcerating defendant for desiring to maintain a relationship with their "life partner" would best serve the interests of rehabilitation or deterrence, or would afford greater protection to the public. *Ibid.*

The Ninth Circuit further reasoned:

> In determining the conditions to be imposed, however, the court must consider certain factors set forth in 18 U.S.C. § 3553(a), including "the

> nature and circumstances of the offense and the history and characteristics of the defendant" and the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford adequate deterrence, to protect the public, and to encourage rehabilitation. The district court's discretion is further curtailed by 18 U.S.C. § 3583(d), which provides that any condition must: (1) be reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) be consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a). [citation] The government bears the burden of demonstrating that these statutory standards are met.

Id. at 1044.

Thus, 18 U.S.C. § 3583(d) provides limiting guidelines to what types of conditions can be placed on parolees. The Ninth Circuit went on say that "if there is a reason for interfering with Napulou and Kahau's relationship that justifies the special condition prohibiting them from contacting one another, regardless of the nature of the contact and of their progress in achieving rehabilitative goals, the government must introduce the appropriate evidence that would warrant the imposition of such a condition." *Ibid.*

Here, Respondents subjected Petitioner to a blanket "no contact" prohibition against relations with his fiancée, without any meaningful record attempting to justify the restriction. Respondents introduced no such evidence and instead attempted to justify the condition after the fact. They alleged that Petitioner had a prior sex offense and that his fiancée was an alleged prostitute. However, neither justifies a complete ban on Petitioner's relations with his fiancée. At the outset, Respondents' restriction was not accompanied by any contemporaneous record or findings, which was required under *Napulou.* At the time the instant parole decision was enforced, the Ninth Circuit had specifically prohibited the very conduct at issue.

Further, Petitioner's prior sex offenses were over twenty years old, and for misdemeanor indecent exposure (whereas *Wolf Child*'s sex offense was for attempted felony sexual assault only one year prior). As for the supposed prostitution, Petitioner is at a loss for the apparent determination that once someone has supposedly been a prostitute, her subsequent relationships are necessarily corruptive and impermissible. That argument was disapproved of by the *Napulou* Court when it strongly admonished that even two convicted felons can have a relationship that is supportive, mutually beneficial, and protected by the Constitution. *Napulou*, 593 F. 3d 1048. On its face, a ban on the relationship between certain types of people due to their past backgrounds and not an assessment of their present actions confirms that this case is more akin to *Loving* and is thus outside the proper scope of government.

It is clear that Respondents' purposeful actions effectively ended his relationship with his fiancée. Respondent Smith implemented parole conditions that prevented Petitioner from contacting or seeing his fiancée, including barring telephone calls with her. In addition to this Court's examples of what constitutes a "substantial burden" on fundamental rights such as the right to marry,[3] this Court has also intimated that conduct less than "a direct legal obstacle" to an individual's choice to marry did not trigger a fundamental right. *See Zablocki v. Redhail*, 434 U.S. 374, 387, 98 S.Ct. 673, n.12 (1978). Parole conditions are direct legal obstacles to what a person can and

[3] *See Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), the challenged statute at issue placed a substantial burden on the right of marriage because it absolutely prohibited interracial marriage. *See also Zablocki v. Redhail*, 434 U.S. 374 (1978), the challenged statute substantially burdened the right of marriage because it forbade noncustodial parents with child support obligations from marrying without first obtaining court permission. *Id. at* 384.

cannot do. Thus, implementing parole conditions that directly impede the ability to marry do trigger a fundamental right and should, at the very least, be subject to some form of judicial review.

Respondents' action of creating a "no contact" parole condition "substantially interfered" with Petitioner's right to marry such that Petitioner's fundamental right to marry was implicated. At the time, no analysis was performed and no justifications for the imposition were made. Further, if protecting Petitioner's fiancée's minor daughter was truly the aim, there were other less restrictive means of accomplishing this, such as preventing Petitioner from contact with the minor, or allowing Petitioner and his fiancée to converse freely on the phone or meet up at neutral locations without the minor child. *See Akers v. McGinnis*, 352 F.3d 1030, 1040 (6th Cir. 2003) (finding direct and substantial burdens "where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely.") (*internal quotation marks omitted*).

Further, Respondents' own motion for summary judgment, which raised only qualified immunity, states that in *Saucier v. Katz,* 533 U.S. 194 (2001) the test to determine liability under qualified immunity examines: (1) whether there was a violation of a constitutional right and (2) if so, whether that right was "clearly established" when the defendant acted. *Id.* at 194. Here, there has been a violation of a clearly established constitutional right—the right to marry and associate with one's spouse. That right has been clearly established. *Loving v. Virginia*, 388 U.S. 1 (1967) first established that the right to marriage was protected by the Constitution. The Ninth

Circuit has twice decided that the right to marry and associate with one's spouse is extended to parolees and cannot be eroded without a significant and compelling evidence that doing so would further a legitimate rehabilitative or penological purpose, or protect the safety of the public. *See United States v. Wolf Child*, 699 F.3d 1082, 1095 (9th Cir. 2012)*; see also United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010). Here, neither the district court nor the Respondents met this burden and thus, the Ninth Circuit's affirmation of the grant for summary judgment was improper.

By contrast, there is no basis for conclusion that absolute immunity stemming from quasi-judicial conduct applies here, because there is no quasi-judicial conduct. Petitioner did not sue the individuals who are the decision makers in California's parole process. Rather, he sued the lower-level officers who enforce parole policies. On its face, these individuals are not acting like judges. Rather, they are acting like police officers. Quasi-judicial immunity has no application here. Indeed the district court's conclusion to the contrary raises the absurdity that quasi-executive action is not subject to judicial review because it is quasi-judicial in nature. On its face, conduct cannot be quasi-executive and quasi-judicial at the same time. And when parole officers act like police officers and enforce policies, they are acting in a manner that is quasi-executive, not quasi-judicial.

This Court should grant review to resolve the Ninth Circuit's decisions in this case and others, holding that enforcement of parole violations is not subject to judicial review because it is quasi-judicial in nature.

A. This Question Is Important

1. Determining whether a fiancée qualifies as the type of "highly personal relationship" protected by the Fourteenth Amendment is an important question because there is some disagreement among the circuit courts. The few Ninth Circuit cases discussing whether a fiancée relationship is included within the right to intimate association involve non-prisoners and are unpublished. *See, e.g., Wittman v. Saenz*, 108 Fed.Appx. 548, 549-50 (9th Cir. 2004) (unpublished memorandum disposition) (concluding that "the First Amendment right of association extends to individuals involved in an intimate relationship, such as fiancés."); *Bevelhymer v. Clark County*, No. 94-15203, 53 F.3d 337, 1995 WL 242320, *3 (9th Cir. 1995) (unpublished memorandum disposition) (recognizing that the Fourteenth Amendment protects intimate association between unmarried couples).

However, other circuits have not been consistent in determining the boundaries of "intimate association" relationships, and even then, those cases have not involved prisoners' rights. *See, e.g., Matusick v. Erie County Water Authority*, 757 F.3d 31, 55-62 (2d Cir. 2014) (granting qualified immunity after finding that a relationship with a fiancé was not clearly established to be protected under the right of intimate association); *Poirier v. Massachusetts Dept. of Corr.*, 558 F.3d 92, 96 (1st Cir. 2009) ("The unmarried cohabitation of adults does not fall under any of the Supreme Court's bright-line categories for fundamental rights in this area, and we decline to expand upon that list to include the type of relationship alleged here") (*citation omitted*).

In light of the dearth of evidence defining the contours of relationships protected by the right of intimate association within a prison context, this Court should grant review to decide the question of whether a prisoner or parolee's relationship with his fiancée is protected under the right of intimate association.

2. This Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972) was a landmark ruling which changed the legal landscape for parolees by requiring a hearing to determine the factual basis for a parole revocation. This case could equally change the legal landscape for parolees as well as probationers across the United States. Millions of people each year are placed on parole and probation. A significant number of those offenders are given strict parole or probation conditions that infringe on their fundamental rights. Unfortunately, few of these offenders are afforded pre-deprivation hearings to assess whether less restrictive means could be used and to assess the constitutionality of those conditions. Offenders who challenge their unconstitutional conditions face an uphill battle. Often by the time an offender concludes his time-consuming challenge, the matter is moot because the offender has completed his parole or probation. This Court now has an opportunity to resolve these problems and to decide that pre-deprivation hearings are required when parole or probation conditions infringe on fundamental rights. Thus, Petitioner prays that this Court grant his petition.

B. This Case Is an Excellent Vehicle to Decide This Question

1. This case provides a clean vehicle to set guidelines for establishing whether the Fourteenth Amendment forbids conditions that ban prisoners and parolees from

marrying. The record is clear that neither the district court nor the Ninth Circuit Court of Appeals performed an analysis as to the constitutionality of denying a parolee the right to associate and marry his fiancée. The question whether the Fourteenth Amendment requires some type of due process or review is not obscured by other issues in this case.

2. This Court generally appears to prefer to grant review in cases that include a full and clear record, including written appellate opinions, and this case provides just that. This case began in a district court which managed it for nearly six years, including written briefs and oral hearings, before the case was appealed to a circuit court. The appeal was decided both on written briefs and oral argument, so there is a strong record for this Court to consider.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PAROLE OFFICERS WHO IMPOSE UNCONSTITUTIONAL PAROLE CONDITIONS SHOULD BE PROTECTED BY QUALIFIED IMMUNITY INSTEAD OF ABSOLUTE IMMUNITY

The Ninth Circuit's decision in this matter is also at odds with a case it decided just earlier this year. Currently, officials are absolutely immune against suits under 42 U.S.C. § 1983 that arise from their performance of prosecutorial functions, even if the acts in question were committed in bad faith. *Imbler v. Pachtman*, 424 U.S. 409, 422-29, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). In *Patterson v. Van Arsdel*, 883 F.3d 826, 829-830 (2018), the Ninth Circuit decided that this type of immunity "is an extreme remedy, and it is justified only where 'any lesser degree of immunity could impair the judicial process itself.'" *Lacey v. Maricopa County*, 693 F.3d 896, 912 (9th Cir. 2012) (en banc) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997), 118 S.Ct. 502).

The general presumption is that qualified immunity provides sufficient protection to officials. *Burns v. Reed*, 500 U.S. 478, 486-87, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). An official seeking absolute immunity bears the burden of showing that such immunity is essential for the function in question. *Id.* at 486, 111 S.Ct. 1934.

In *Van Arsdel*, the Ninth Circuit decided to take a functional approach to determining whether a given action is protected by prosecutorial immunity. The *Van Arsdel* Court found that immunity flows from "the nature of the function performed, not the identity of the actor who performed it." *Patterson v. Van Arsdel*, 883 F.3d at 829-830 (2018), citing *Kalina*, 522 U.S. at 127, 118 S.Ct. 502. In applying this approach, it distinguished between acts of advocacy, which are entitled to absolute immunity, and administrative and "police-type" investigative acts which are not. To qualify as advocacy, an act must be "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S.Ct. 984. For such acts, absolute immunity furthers the doctrine's core goal of preventing retaliatory lawsuits that may impose "unique and intolerable" burdens upon prosecutors. *Id.* at 425-26, 96 S.Ct. 984. Actions classified as "advocacy" include initiating a prosecution and presenting the state's case (*Imbler*, 424 U.S. at 431, 96 S.Ct. 984), appearing at a probable cause hearing to support an application for a search warrant (*Burns*, 500 U.S. at 491, 111 S.Ct. 1934), and preparing and filing a motion for an arrest warrant. (*Kalina*, 522 U.S. at 129, 118 S.Ct. 502.)

It is established law that parole officers are absolutely immune from imposing unconstitutional parole conditions only when they are acting in a quasi-judicial

function, a distinction that the Ninth Circuit failed to make. The eligibility inquiry for absolute immunity, then, turns on "the nature of the function performed, not the identity of the actor who performed it." *Butz v. Economou*, 438 U.S. 478, 511-12 (1978).[4] It is well established law in the Ninth Circuit that parole officers may only be acting within the bounds of absolute immunity when they are making quasi-judicial decisions such as whether to grant, deny or revoke parole.

The Ninth Circuit decided in *Swift v. California* that it must not be determined whether an action "relates to" the decision to grant, deny, or revoke parole, but whether an action is taken by an official "performing a duty functionally comparable to one for which officials were rendered immune at common law." *Swift v. California*, 384 F.3d 1184, 1189 (9th Cir. 2004); *see also*, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436-37, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993).

In *Anderson v. Boyd*, the Ninth Circuit also found that parole officers are not entitled to absolute immunity for conduct "taken outside an official's adjudicatory role [,]" or "arising from their duty to supervise parolees." *Anderson v. Boyd*, 714 F.2d 906, 909-910 (9th Cir. 1983). Further, in *Anderson*, the court found that parole officers are not entitled to absolute immunity for their conduct while: (1) investigating parole violations, (2) ordering the issuance of a parole hold and orchestrating an arrest, and (3) recommending the initiation of parole revocation proceedings.

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[4] The eligibility inquiry for absolute immunity, then, turns on "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (citation and internal quotation marks omitted); *see also Clinton v. Jones*, 520 U.S. 681, 695 (1997); *Waggy v. Spokane Cty. Wash.*, 594 F.3d 707, 710-11 (9th Cir. 2010); *Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009); *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005); *KRL v. Moore*, 384 F.3d 1105, 1113 (9th Cir. 2004).

The *Swift* Court found that under California's system of parole, a parole agent acts as a law enforcement official when investigating parole violations and executing parole holds. *Swift*, 384 F.3d at 1189 (9th Cir. 2004). In California, the issuance of a parole hold is an act by the parole agent that takes place independently of the parole decisional authority. *In re Law*, 10 Cal.3d 21, 23 n. 2, 109 Cal. Rptr. 573, 575 n.2, 513 P.2d 621, 623 n. 2 (1973). The ability to issue a parole hold gives the parole officer "the power . . . to have the parolee restrained merely by exercising his authority to take the parolee into custody and book him into a local jail." *Id.* When issuing a parole hold, or authorizing an arrest, a parole agent functions as a police officer. *See Johnson v. Rhode Island Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987).

By contrast, in *Scotto*, the Second Circuit reasoned that when a parole officer recommends that a senior official initiate parole revocation proceedings, the recommendation is not comparable to initiating a prosecution and is more analogous to "a police officer applying for an arrest warrant." *Scotto v. Almenas*, 143 F.3d 105, 112-13 (2d Cir. 1998). The recommending officer is thus only entitled to qualified immunity, while the senior official who makes the discretionary decision to issue the warrant is the one who initiates the revocation "prosecution" and is absolutely immune. *Id.* at 113.

Parole officers under the California regulations must report parole violations, while the Parole Board is given the discretion to initiate the revocation proceedings. *See id.* ("Parole violations . . . must be reported to the board."). In *Swift*, the court found that in construing an allegation of false reports made by two parole officers to justify an arrest:

> [I]n the light most favorable to Swift, as we must, this statement parallels the regulations and suggests that Christian and Rodriguez performed a non-discretionary function, while another official made the discretionary prosecutorial decision to issue the order for a revocation hearing. We conclude that, like the parole officer in *Scotto*, Christian and Rodriguez's actions requesting that the BPT initiate revocation proceedings, were more akin to a police officer seeking an arrest warrant, than to a prosecutor exercising quasi-judicial discretion to initiate criminal proceedings. Thus, Christian and Rodriguez are not entitled to absolute immunity for recommending that the BPT initiate revocation proceedings.

Swift v. California, 384 F.3d 1184, 1193 (9th Cir. 2004).

It is also worth noting Footnote 4 of *Swift*:

> The majority of circuits addressing the scope of official immunity for parole officials have held that when a parole officer is performing a law enforcement function, the officer is entitled to only qualified immunity. *See e.g.*, *Johnson v. Rhode Island Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir. 1987) ("[T]he function of an arresting parole officer is more akin to that of a police officer . . . such that the rationale for according that official absolute immunity, as described previously by the Ninth Circuit [in *Anderson*], is inapplicable to the parole officer."); *Scotto v. Almenas*, 143 F.3d 105, 112-13 (2d Cir. 1998) (deciding issue after Supreme Court's decision in *Antoine*).

Id.

Thus, the Ninth Circuit should not have affirmed the district court's decision that parole officers qualify for absolute immunity when they enforce parole conditions that infringe on the constitutional rights of parolees.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 8, 2018